IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ANTONIO CATALINO MYRIE, JR.,	)	
	)	
Appellant,	)	
v.	)	Case No. F-2009-1142
	)	Not for Publication
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

SMITH, JUDGE:

Antonio Catalino Myrie, Jr., Appellant, was tried by jury and convicted of five counts of Knowingly Concealing/Receiving Stolen Property, under 21 O.S.2001, § 1713 (Counts I-V); First-Degree Arson, under 21 O.S.2001, § 1401 (Count VI); and Second-Degree Burglary, under 21 O.S.2001, § 1435 (Count VII),[1] all After Former Conviction of Two or More Felonies, in the District Court of Tulsa County, Case No. CF-2008-6029.[2] In accord with the jury verdict, the Honorable William C. Kellough, District Judge, sentenced Myrie to imprisonment for 30 years and a fine of $500 on each of Counts I-V, imprisonment for Life and a fine of $25,000 on Count VI, and imprisonment for 30 years and a fine of $10,000 on Count VII, with Counts I-V all to run concurrently, but consecutively to both Count VI and Count VII.[3] Myrie is before this Court on direct appeal.

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[1] Although Myrie was clearly charged with second-degree burglary, and the jury was properly instructed upon and convicted him of this crime, the Second Amended Information and the Judgment & Sentence for Count VII both incorrectly cite 21 O.S., § 1431 (first-degree burglary), rather than § 1435 (second-degree burglary). This clear scrivener's error is corrected herein.

[2] The arson and burglary counts were originally filed in a separate Tulsa County case, CF-2008-6224. The State's motion to join the two cases was filed on May 28, 2009, and granted on June 12, 2009. The joinder of the two cases is the basis for Myrie's claim in Proposition III.

[3] The Judgment & Sentence for Count III fails to include the $500 fine. Because the jury clearly

Myrie raises the following propositions of error:

I. APPELLANT WAS DENIED A COPY OF HIS PRELIMINARY HEARING TRANSCRIPT AT GOVERNMENT EXPENSE PRIOR TO TRIAL. THE DISTRICT COURT'S REFUSAL TO GRANT APPELLANT'S REQUEST FOR A CONTINUANCE OF THE TRIAL HEREIN IN ORDER TO SECURE A COPY OF THE TRANSCRIPT CONSTITUTED AN ABUSE OF DISCRETION.

II. THE STATE PRESENTED OTHER CRIMES EVIDENCE IN VIOLATION OF THE OKLAHOMA EVIDENCE CODE. APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

III. IT WAS IMPROPER TO JOIN THE BURGLARY AND ARSON CHARGES IN CF-2008-6224 WITH THE KNOWINGLY CONCEALING STOLEN PROPERTY CHARGES IN CF-2008-6029. THE JOINDER VIOLATED BOTH OKLAHOMA LAW AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

IV. APPELLANT WAS CONVICTED OF MULTIPLE VIOLATIONS OF KNOWINGLY CONCEALING STOLEN PROPERTY WHEN THE EVIDENCE SUPPORTED NO MORE THAN A SINGLE OFFENSE. APPELLANT'S MULTIPLE CONVICTIONS VIOLATE THE DOUBLE PUNISHMENT PROHIBITION OF BOTH THE UNITED STATES CONSTITUTION AND OKLAHOMA LAW.

V. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT.

VI. THE FAILURE TO PROVIDE THE JURY WITH ACCOMPLICE CORROBORATION INSTRUCTIONS FOR WITNESS EUGENE TRIPKE CONSTITUTED REVERSIBLE ERROR.

VII. THE COMBINED EFFECT OF ERROR AT APPELLANT'S TRIAL REQUIRES THE MODIFICATION OF HIS SENTENCE.

In Proposition I, Myrie challenges the trial court's refusal to grant a continuance of his trial, based upon the fact that he was indigent and his trial attorneys did not yet have the transcripts from his preliminary hearings. This Court reviews a trial court's decision regarding whether to grant a continuance for an abuse of discretion.[4] This Court evaluates the trial court's decision in the context of the specific factual context in which it was made.

Because the charges in this case were originally filed as two separate cases, two preliminary hearings were held. The preliminary hearing for CF-2008-6224—involving the Name Brand Clothing burglary/arson (the "NBC" case)—was

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indicated a $500 fine on this count, and the court listed it at the time of sentencing, this Court finds that this omission was a scrivener's error. Myrie was also ordered to pay costs and fees. This Court notes that Count VI is subject to the "85% Rule," under 21 O.S. Supp.2007, § 13.1.

[4] *See, e.g., Jones v. State*, 1995 OK CR 81, ¶ 7, 917 P.2d 976, 978.

held first. The NBC preliminary hearing was held on February 2, 2009, and included seven witnesses.[5] The preliminary hearing for CF-2008-6029—involving the five counts of Knowingly Concealing/Receiving Stolen Property (the "KCSP" case)—was held on February 19, 2009, and also included seven witnesses.[6]

Myrie was represented at both preliminary hearings by Assistant Public Defender Paula Moore. Moore remained Myrie's counsel through at least November 2, 2009.[7] During this entire time, she never requested a copy of the transcript of either preliminary hearing.[8] Moore left the public defender's office during early November of 2009 (sometime before November 12, 2009).

According to the docket, a motion for continuance was denied on November 12, 2009, and an order for transcript was signed on this same date.[9] The Court's "Order for Transcript," filed on November 13, 2009, finds that Myrie is entitled to transcripts of the preliminary hearings held on February 2 and 19, 2009, paid for by the State, and orders that the named court reporter prepare "a complete transcript of the testimony of all witnesses at the Preliminary Hearing . . . and that the transcript shall be prepared and served prior to the trial of the

[5] Four Tulsa police officers testified (Steve Shamburger, Bob Hickey, Robert McCoy, and Joshua Martin), along with Brent Dalley (the store manager), Mike Ross (the maintenance worker at the store when the fire was set), and Millard Latimer (Tulsa Fire Department fire marshal and investigator). The transcript of the NBC preliminary hearing is 45 pages long.

[6] Two Tulsa police officers testified (Robert McCoy and Joshua Martin), along with a representative from each of the five church organizations from which stolen items were recovered. The transcript of the KCSP preliminary hearing is 76 pages long.

[7] Moore represented Myrie at a combined *Jackson-Denno* and *Allen* hearing on November 2, 2009.

[8] At a September 18, 2009, hearing on pro se motions filed by Myrie, the district court noted that Myrie was seeking a copy of his preliminary hearing transcripts. Moore responded, "*Tiger v. State* . . . prohibits [the public defender's office] from giving our one and only copy to our client." The court then told Myrie, "Your counsel needs that transcript, so if you need an additional copy, then I'm afraid you're going to have to make arrangements to pay for it." Moore failed to "remind" the court, however, that she had not sought or obtained any preliminary hearing transcripts. Hence counsel's invocation of *Tiger v. State*, 1993 OK CR 43, 859 P.2d 1117, was quite inappropriate.

[9] The record, however, contains no written motion for continuance or any other indication of a hearing on this issue.

Defendant in District Court."[10] The order does not, however, inform the court reporter of Myrie's impending trial date: November 16, 2009. And the Court Reporter's Certificate, filed on November 16, 2009, states that the transcript was ordered on November 12 and would be available on November 30, 2009.

Myrie's jury trial began on Monday, November 16, 2009. Myrie was represented by Assistant Public Defenders Lauren Chandler and Brian Rayl. The transcribed proceedings begin with Myrie asserting that he had just learned (the preceding Friday) that he had new attorneys and that he did not believe they were prepared to try his case. The court responded that if Myrie was seeking a continuance, the court was denying it. The court noted that Chandler had filed a motion for continuance "based on the unavailability of transcripts" and that the court denied it "and determined that counsel should be, and would be, ready to go to trial." The court then asked Myrie's attorneys if they were prepared to go forward, to which Chandler responded, "Your Honor, we will stand on our previous motion for continuance."[11]

Myrie's trial was conducted during the week of November 16-20, 2009.[12] On the second day of trial, outside the presence of the jury, the trial judge stated that he wanted to "more fully express" his reasons for denying the defense motion

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[10] At a hearing held on June 11, 2009, the trial court questioned Myrie and confirmed that he had been indigent since the inception of the case and been in custody since December 1, 2008.

[11] The court noted that the record would reflect that defense counsel had not waived their motion for continuance and continued to object to going forward. When the court reminded Myrie that he was being represented by his attorneys, who would be speaking for him, Myrie asserted, "I understood that. I just wanted to know if 24 hours was an appropriate time [to prepare]. That's all." The court responded, "It seems to me that it is." At this point Rayl spoke up, noting that he had just entered an appearance in the case, and challenged the joinder of the NBC case with the KCSP case. After briefly addressing this issue (raised in Proposition III), the court denied this renewed objection to the joinder and shortly thereafter called for potential jurors to be brought in.

[12] The transcripts of the two preliminary hearings were filed on November 25, 2009.

for continuance.[13] The court noted that it "did not believe that the defendant's rights would be materially impaired," because Moore was a "very experienced defense counsel" and that "there could well have been a strategy for not requesting those transcripts." Chandler responded by noting that while *Ms. Moore* may have had a strategic reason for not requesting the transcripts, she (Ms. Chandler) was not present at the preliminary hearings and believed that the transcripts "would have been very helpful" in preparing to cross-examine the State's witnesses at trial. The court responded by finding that its denial of the motion for continuance "stands."

This Court recognizes that an indigent defendant's right to a free copy of the transcript of his preliminary hearing has been established since the Supreme Court's 1967 decision in *Roberts v. LaVallee.*[14] In *McMillion v. State,*[15] this Court likewise recognized that "[i]t is repugnant to the Constitution and a violation of equal protection to deny an indigent a free copy of the transcript of his preliminary hearing."[16] This Court also found that because the "denial of a free copy of a preliminary hearing transcript to an indigent is a substantial violation of a constitutional right, [20 O.S.,] Section 3001.1 does not apply" and that "the indigent's right to a transcript of the preliminary hearing at public expense is not based on any consideration of whether the transcript of the preliminary hearing

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[13] The court then reviewed the procedural history of the case, noting that no request for the transcripts was made at arraignment, during discovery, or in the days leading up to the original trial date of June 8, 2009. The court noted that "there are reasons and strategies for not requesting transcripts" and that the first request, "on the eve of trial . . . . was simply too late."

[14] *Roberts*, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967) (per curiam).

[15] *McMillion*, 1987 OK CR 193, 742 P.2d 1158.

[16] *Id.* at ¶ 6, 742 P.2d at 1160 (citing *Roberts*).

is beneficial to the defense."[17]

In *Wilson v. State*,[18] this Court found that "[a]n accused is entitled to a transcript of a preliminary hearing where: (1) defense counsel acted with due diligence to acquire the transcript; and (2) the transcript is necessary for cross-examination of witnesses at trial."[19] *McMillion* likewise recognized this requirement,[20] and both courts found that failure to provide a transcript when these conditions are met will result in reversal of any subsequent conviction.[21] This Court notes that the defendant's convictions were reversed in both *Wilson* and *McMillion* even though the attorney representing the defendant at trial was the same attorney who represented him at preliminary hearing.[22] And none of these cases—which reversed the defendant's convictions based upon denial of a free preliminary hearing transcript—suggest that the defendant has to establish precisely *how* he would have used the (non-available) transcript at trial, or that he must make a particular, fact-specific showing of "necessity," in order to establish entitlement to the transcript and the need for a new trial.

Myrie's trial attorneys were *not* the same as his preliminary hearing counsel, nor were they present at his preliminary hearings, which made the necessity of the preliminary hearing transcripts for their trial preparations even

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[17] *Id.* at ¶ 8, 742 P.2d at 1160-61; *see also Waters v. State*, 1969 OK CR 174, ¶ 7, 454 P.2d 325, 328 (same).

[18] *Wilson*, 1985 OK CR 67, 701 P.2d 1040.

[19] *Id.* at ¶ 3, 701 P.2d at 1041 (citation omitted).

[20] 1987 OK CR 193, ¶ 9, 742 P.2d at 1161.

[21] *Id.* at ¶ 9, 742 P.2d at 1161; 1985 OK CR 67, ¶ 3, 701 P.2d at 1041.

[22] *McMillion* specifically rejected the State's argument that the denial of the transcript in that case was harmless error for this reason, noting that in both *Roberts* and *Waters v. State*, 1969 OK CR 174, 454 P.2d 325, the appellant was represented by the same counsel at both preliminary hearing and at trial. *See McMillion*, 1987 OK CR 193, ¶ 8, 742 P.2d at 1161 (citing *Roberts* and *Waters*). The *McMillion* Court concluded: "Therefore, the presence of the same counsel at both stages of the proceedings is not dispositive." *Id.*

more significant. Furthermore, the record supports Myrie's claim that his trial attorneys did act with "due diligence" in attempting to acquire these transcripts, soon after they became involved with Myrie's case. Under these circumstances, this Court finds that the trial court's failure to grant the requested continuance, along with the court's failure to ensure that Myrie's attorneys were provided with these transcripts *prior* to his trial, resulted in an effective denial of these preliminary hearing transcripts to an indigent defendant who was constitutionally entitled to be provided them. Hence the trial court's denial of Myrie's motion for continuance was an abuse of discretion.[23] And Myrie's convictions must be reversed on this basis.

In Proposition II, Myrie challenges the trial court's admission of "other crimes" evidence, based upon the court's allowance of substantial evidence regarding the factual circumstances of the five church-related burglaries, none of which Myrie was actually charged with committing. In Proposition III, Myrie challenges the court's decision to allow the joinder of the Name Brand Clothing burglary/arson case with the KCSP case involving the property stolen from the Tulsa area churches. This Court addresses these related claims together, beginning with the improper joinder claim.

Myrie properly preserved his improper joinder claim in the trial court.[24] We review improper joinder claims for abuse of discretion.[25] In *Glass v. State*,[26]

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[23] *Cf. Jones v. State*, 1995 OK CR 81, ¶¶ 7-8, 917 P.2d 976, 978 (finding abuse of discretion for denial of continuance where defense counsel learned of State's intent to proceed to trial "four days before the actual trial began" and where "[t]wo of these four days consisted of the weekend.").

[24] Both Myrie's original counsel and his trial counsel objected to the joinder, and the State does not dispute that this claim was properly preserved.

[25] *See, e.g., Smith v. State*, 2007 OK CR 16, ¶ 21, 157 P.3d 1155, 1164.

this Court recognized that joinder of separate offenses in a single case is permissible, under 22 O.S., § 436, only "if the separate offenses arise out of one criminal act or transaction, or are part of a series of criminal acts or transactions."[27] The *Glass* Court further recognized that the test for such a "series" of properly joined offenses is whether "the counts so joined refer to the same type of offenses, occurring over a relatively short period of time, in approximately the same location, and proof as to each transaction overlaps so as to evidence a common scheme or plan."[28]

This Court concludes that the NBC burglary/arson case, CF-2008-6224, was *not* properly joined with the church-related KCSP case, CF-2008-6029. The two cases did not involve the same type of offenses, since the KCSP case did not involve an allegation that Myrie actually committed any of the church burglaries; nor did the NBC case allege that Myrie actually took or kept any property from the store. Nor did the cases involve crimes committed during the same relatively short period of time. The NBC burglary/arson was committed on August 20, 2008. The church-related burglaries all occurred during November of 2008, beginning on November 6, 2008. Hence two and one-half months passed between the NBC burglary/arson and the time at which Myrie could have come into possession of the property stolen from the Tulsa churches. Regarding proximity, the State notes that the charged crimes all occurred in Tulsa County,

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[26] *Glass*, 1985 OK CR 65, 701 P.2d 765.

[27] *Id.* at ¶ 8, 701 P.2d at 768; *see also* 22 O.S.2001, § 436.

[28] *Id.* at ¶ 9, 701 P.2d at 768; *see also Smith*, 2007 OK CR 16, ¶ 23, 157 P.3d at 1165 (finding joinder proper where joined counts "refer to: (1) the same type of offenses; (2) occurring over a relatively short period of time; (3) in approximately the same location; and (4) proof of each act or transaction overlaps so as to show a common scheme or plan." (citing *Glass*)).

but this Court does not agree that being within a county as large as Tulsa constitutes "approximately the same location," especially when the type of crimes charged and the victims are not similar. Finally, this Court rejects the State's claim that the proof in the two cases was overlapping to the extent that it established a "common scheme or plan."

There is no question that the five KCSP counts were properly joined in one case. This Court notes, however, that the apartment where the stolen church items were recovered did not contain anything stolen from the NBC store. And the "scheme" at issue in the NBC case (breaking into a commercial establishment in order to steal money, attempting to breach a safe, and then setting a fire) was *not* so similar to the scheme at issue in the KCSP case (re-selling sound equipment, instruments, computers, *etc.*, stolen from church properties, for profit) so as to suggest a "common scheme or plan." Hence the district court abused its discretion in joining the two cases.

The State argues that the schemes at issue are similar because "the crimes all involved the same people driving one another in the same vehicle to various places to commit burglary." This *may*, in fact, be true, but the State could not present any actual *evidence* that this was true. By joining the two cases together, however, the State was much more able to strongly *suggest* that Myrie was directly involved in the church burglaries, which leads to his Proposition II "other crimes" evidence challenge. This Court notes that by closing arguments of the first-stage of trial, the State was unabashedly claiming that the jury should

hold Myrie accountable for the actual church burglaries.[29]

This Court finds that if the KCSP counts had been tried separately from the NBC burglary/arson counts—as they should have been—the State would not have been allowed to put on the amount of "other crimes" evidence that came in regarding the specific factual circumstances of the church burglaries.[30] This evidence was *not* necessary or appropriate to prove the simple fact at issue in the KCSP charges—that the defendant knew or should have known that the property was stolen—particularly since Myrie *admitted* that he knew the property was stolen. Hence this Court likewise finds that the joinder of the two cases—and the State's attempts to prove that a "common scheme" was at work in both—resulted in the improper admission of unduly prejudicial "other crimes" evidence.[31] We likewise find that the trial court abused its discretion in admitting this evidence, which allowed the State to suggest and later specifically argue that Myrie was the Tulsa church burglar and that the jury should hold him "accountable" for these burglaries.

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[29] The State concluded its initial guilt-stage closing argument stating:

> It's your job now to hold [Mr. Myrie] accountable. It's your job to tell him that it is illegal, immoral, and abhorrent to steal from five different churches. It is also illegal and abhorrent and immoral to break into a Name Brand Clothing to steal money and then when you're done, because you can't bust open the safe, to set the place on fire. That's not allowed and it's your job to let him know it's not allowed.

The State likewise concluded its rebuttal closing argument as follows: "Antonio Myrie is a thief and an arsonist. Antonio Myrie today is going to be held accountable by you, citizens of Tulsa County, and I ask you to do that now."

[30] At trial, the State was allowed to present substantial evidence, over repeated defense objection, about things like some of the church properties being entered through a broken window (as was the NBC store) and that the church burglar was able to avoid setting off church alarm systems that were on at the time (as was the NBC burglar).

[31] *See Wall v. State*, 1988 OK CR 125, 763 P.2d 103 (reversing one-count KCSP conviction where State allowed to present improper and unduly prejudicial "other crimes" evidence that defendant, who had previously been convicted of burglary and rape, acquired victim's property at the time he raped and threatened to kill her); *Thomas v. State*, 1980 OK CR 104, 620 P.2d 1321 (modifying robbery with firearms sentence where trial court failed to properly limit counter-alibi "other crimes" testimony, regarding defendant's involvement in second robbery on same night).

This Court recognizes that more than sufficient evidence was presented to convict Myrie on all seven counts that were charged against him. The evidence against him on all seven counts, including his direct admissions of guilt regarding the KCSP counts and his admission to assisting in the NBC burglary/arson, was quite damning. However, this Court cannot ignore the likely prejudicial impact of both the joinder and the improperly admitted evidence regarding the sentences given by the jury: life and a fine of $25,000 for the arson count, 30 years and a fine of $10,000 for the second-degree burglary count, and 30 years and a fine of $500 on each of the five KCSP counts. Even with Myrie's extensive criminal history, this Court could not conclude, beyond a reasonable doubt, that the joinder of the two cases and improperly admitted evidence did not prejudicially impact Myrie, particularly on the KCSP counts.

This Court need not decide what relief to grant regarding Propositions II and III, however, since we have already concluded that Myrie is entitled to have the charges against him re-tried, based upon the trial court's failure to ensure that his trial attorneys had access to the transcripts of his preliminary hearings. We here further find that the counts against him must be re-tried in two separate cases, just as they were originally charged in two separate cases.

In Proposition IV, Myrie argues that it violated double jeopardy and 21 O.S.2001, § 11, to charge and convict him of five counts of Knowingly Concealing Stolen Property, rather than simply one count. In particular, Myrie asserts that the five KCSP counts actually involved a single "offense" and a single "act" of

possession. In light of this Court's resolution of Propositions I-III and Myrie's failure to preserve this claim in the district court, we address it only summarily.

This Court notes that Myrie's recorded admissions establish that he was well aware that the stolen property he was acquiring came from separate church burglaries and also suggest that he came into possession of the stolen property from these separate burglaries at different times, *i.e.*, shortly after each of the five church burglaries.[32] Under these circumstances, Myrie has not established that it violated either the double jeopardy protection against "double punishment" or Section 11 to charge and convict him of five counts of this possession offense. This claim is rejected accordingly.

In Proposition V, Myrie argues that his trial counsel was ineffective for failing to argue that many of the ten prior felonies presented to his jury at the sentencing stage of his trial were "transactional," such that they should not have been presented separately.[33] On July 30, 2010, Myrie filed a "Motion to Remand for Evidentiary Hearing" based upon this same claim. In light of this Court's resolution of Propositions I-III, we decline to address this issue herein. Myrie can raise his claim regarding the transactional nature of his prior felony offenses during the re-trial of the cases at issue herein. We likewise **DENY** his **Motion to Remand for Evidentiary Hearing**, because it is moot due to this Court's decision to reverse his convictions.

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[32] On the other hand, Myrie correctly notes that the various Informations filed in this case all allege that all five KCSP counts occurred during the same time period, *i.e.*, from November 16, 2008, until December 1, 2008.

[33] *See* 21 O.S.Supp.2002, § 51.1; *Cardenas v. State*, 1985 OK CR 21, ¶¶ 10-11, 695 P.2d 876, 878-79; *Bickerstaff v. State*, 1983 OK CR 116, ¶¶ 9-10, 669 P.2d 778, 780.

In Proposition VI, Myrie challenges the trial court's failure to instruct the jury regarding the "accomplice testimony" of Eugene Tripke, even though he failed to request such an instruction at trial. This Court agrees that the record clearly establishes that Tripke was an admitted accomplice to the five KCSP counts, for which instruction under Oklahoma's uniform instructions for accomplice testimony would have been appropriate.[34] On the other hand, there is no question that Tripke's testimony was amply corroborated, in particular by Myrie's admissions regarding commission of the KCSP offenses. In addition, the State admitted during argument at trial that Tripke was "a liar and a thief and a drug dealer." In light of this Court's resolution of Propositions I-III, this claim is moot and need not be further addressed herein.

In Proposition VII, Myrie raises a cumulative error claim, arguing that his sentences should be modified. In light of this Court's resolution of Propositions I-III, this claim is entirely moot.

Decision

Myrie's convictions in CF-2008-6029 are all **REVERSED**, and this case is **REMANDED** for further proceedings consistent with this opinion. Myrie's Motion to Remand for Evidentiary Hearing is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM C. KELLOUGH, DISTRICT JUDGE

[34] *See* OUJI-CR 2d (2000 Supp.) 9-25, 9-26, 9-27, 9-28, 9-30; OUJI-CR 2d (2006 Supp.) 9-32.

ATTORNEYS IN TRIAL COURT

LAUREN CHANDLER
BRIAN RAYL
PAULA KECK MOORE
ASSISTANT PUBLIC DEFENDERS
PUBLIC DEFENDER'S OFFICE
423 S. BOULDER AVE., SUITE 300
TULSA, OK 74103
ATTORNEYS FOR DEFENDANT

ERIK GRAYLESS
JOHN BENNETT
JACK THORP
ASSISTANT DISTRICT ATTORNEYS
DISTRICT ATTORNEY'S OFFICE
406 COURTHOUSE
500 SOUTH DENVER AVE.
TULSA, OK 74103
ATTORNEYS FOR THE STATE

ATTORNEYS ON APPEAL

STUART W. SOUTHERLAND
ASSISTANT PUBLIC DEFENDER
PUBLIC DEFENDER'S OFFICE
423 S. BOULDER AVE., SUITE 300
TULSA, OK 74103
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
JENNIFER B. WELCH
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR APPELLEE

OPINION BY: SMITH, J.

A. JOHNSON, P.J.:	DISSENT
LEWIS, V.P.J.:	CONCUR IN RESULTS
LUMPKIN, J.:	DISSENT
C. JOHNSON, J.:	CONCUR

A. JOHNSON, PRESIDING JUDGE, DISSENTING:

I agree with the majority that the trial court committed error in denying this indigent defendant's request for a continuance of his trial because his trial attorneys had not yet received a copy of his preliminary hearing transcript. What is not clear, however, is whether the defendant suffered prejudice as a result of that error. The majority relies primarily on two cases dealing with the unconstitutional denial of a free preliminary hearing transcript to an indigent defendant: *McMillion v. State,* 1987 OK CR 193, 742 P.2d 1158 and *Wilson v. State,* 1985 OK CR 67, 701 P.2d 1040. Both cases hold that an accused is entitled to a transcript of a preliminary hearing where: 1) defense counsel acted with due diligence to acquire the transcript; and 2) the transcript is necessary for cross-examination of witnesses at trial.[1] This is the test used to determine if a ruling denying a free preliminary hearing transcript to an indigent defendant is error. The failure to provide a transcript when these two requirements are met results in reversal of any subsequent conviction. *McMillion,* 1987 OK CR 193, ¶ 10, 742 P.2d at 1161.

The trial court in Myrie's case granted his request for a free transcript of his preliminary hearing, but the transcript was not prepared in time for use at trial. The court neither denied the request because counsel did not act diligently nor because Myrie did not make a sufficient showing of necessity.

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[1] The trial court in *Wilson* denied the indigent defendant's request for a free copy of his preliminary hearing transcript altogether and in *McMillion* the trial court revoked its original order for a transcript at public expense because the defendant was released on bail.

This is not the same kind of equal protection violation involving disparate treatment of indigent and non-indigent defendants that required relief in *Wilson* and *McMillion*. There is no reason under these circumstances to exempt this error from harmless error analysis because we can quantitatively assess the error in the context of the trial evidence presented in order to determine whether absence of the preliminary hearing transcript for preparation and impeachment purposes was harmless beyond a reasonable doubt.[2] *See e.g.*

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[2] As we recently stated in *Robinson v. State*, 2011 OK CR 15, ¶¶ 3-4, 255 P.3d 425, 428:

> Most constitutional errors are subject to harmless error analysis. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). Trial errors may be assessed along with the evidence presented, to determine whether the error prejudiced the defendant. *Arizona v. Fulminante*, 499 U.S. 279, 307–08, 111 S.Ct. 1246, 1264, 113 L.Ed.2d 302 (1991). Structural errors, by contrast, affect the conduct of the entire trial and cannot be separated from it for purposes of analysis. *Fulminante*, 499 U.S. at 309–10, 111 S.Ct. at 1265. They "undermine the fairness of a criminal proceeding as a whole." *U.S. v. Dominguez Benitez*, 542 U.S. 74, 81, 124 S.Ct. 2333, 2339, 159 L.Ed.2d 157 (2004)...
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> There is a strong presumption that errors which occur during trial are subject to harmless error analysis, as long as a defendant is represented by counsel and is tried by an impartial judge. *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *Rose v. Clark*, 478 U.S. 570, 579, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 460 (1986). The United States Supreme Court has restricted use of structural error, with its requirement of automatic reversal, to "a limited class of cases." *Johnson v. United States*, 520 U.S. 461, 468–69, 117 S.Ct. 1544, 1549–50, 137 L.Ed.2d 718 (1997). These errors appear to have in common the violation of a right granted by the Constitution, rather than a violation of due process by failure to afford a right granted by state statute. Among these are a faulty jury instruction on reasonable doubt, *Sullivan v. Louisiana*, 508 U.S. 275, 282, 113 S.Ct. 2078, 2083, 124 L.Ed.2d 182 (1993); intentional racial discrimination in selection of grand jurors, *Vasquez v. Hillery*, 474 U.S. 254, 263–64, 106 S.Ct. 617, 623, 88 L.Ed.2d 598 (1986); denial of the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 49, 104 S.Ct. 2210, 2217, 81 L.Ed.2d 31 (1984); denial of the right to self-representation, *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S.Ct. 944, 950 n. 8, 79 L.Ed.2d 122 (1984); improper exclusion of qualified capital jurors, *Davis v. Georgia*, 429 U.S. 122, 123, 97 S.Ct. 399, 400, 50 L.Ed.2d 339 (1976) (*per curiam*); exposure to improper publicity which wholly denies the defendant an impartial jury, *Sheppard v. Maxwell*, 384 U.S. 333, 351–352, 86 S.Ct. 1507, 1516, 16 L.Ed.2d 600 (1966); failure to afford a defendant the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 345, 83 S.Ct. 792, 797, 9 L.Ed.2d 799 (1963); and

Arizona v. Fulminante, 499 U.S. 279, 307–08, 111 S.Ct. 1246, 1264, 113 L.Ed.2d 302 (1991); *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); *see also People v. Nord,* 790 P.2d 311, 318 (Colo.1990) (holding the unconstitutional denial of an indigent defendant's request for a preliminary hearing transcript is an error subject to harmless error analysis). And doing so is consistent with the jurisprudence of this court that "it is not error alone that reverses judgments of convictions of crime in this State, but error plus injury, and the burden is upon the appellant to establish to the appellate court the fact that he was prejudiced in his substantial rights by the commission of error."[3] *Grissom v. State,* 2011 OK CR 3, ¶ 25, 253 P.3d 969, 979.

Further, I cannot join the majority's decision that improper joinder of counts also mandates reversal of this case.

The majority finds that the evidence against Myrie on all seven counts was overwhelming, and concludes that improper joinder and the consequent admission of other crimes evidence may well have affected jury sentencing.

An appropriate modification of appellant's sentence would remedy this error without requiring two new trials, one for each case improperly joined.

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the lack of an impartial trial judge, *Tumey v. Ohio,* 273 U.S. 510, 535, 47 S.Ct. 437, 445, 71 L.Ed. 749 (1927).

[3] Appellant Myrie does not identify any harm resulting from the denial of his continuance and unavailability of the preliminary hearing transcript, such as how he could have used the non-available transcript at trial to impeach witnesses. His brief states only "While Appellant believes that he suffered prejudice, his position is that it is not necessary for him to do so in order for this Court to reverse his convictions." *Brief* at 10.

In sum, there were two errors at trial—the court's refusal to grant a continuance pending defense receipt of the preliminary hearing transcript and joining the two cases. The first is harmless and the second may be remedied by an appropriate sentence modification.

I am authorized to state that Judge Lumpkin joins in this dissent.